

EXHIBIT

5

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----
5 TRAVELERS CASUALTY AND SURETY COMPANY as
6 Administrator for RELIANCE INSURANCE
7 COMPANY,

8 Plaintiff,

9 -against-

10 DORMITORY AUTHORITY-STATE OF NEW YORK, TDX
11 CONSTRUCTION CORP. and KOHN PEDERSEN FOX
12 ASSOCIATES, P.C.,

13 Defendants.

14 Case No. 08-CV-6915 (DLC)

15 (CAPTION CONTINUED)

16 -----
17 June 19, 2008

18 10:09 a.m.

19 DEPOSITION of JOHN SCARPELLINO,
20 taken by Plaintiff, pursuant to Notice,
21 held at the offices of HOLLAND & KNIGHT
22 LLP, 195 Broadway, New York, New York
23 before Wayne Hock, a Notary Public of the
24 State of New York.
25

1 J. Scarpellino

2 terms "certain reinsured contracts" and
3 "certain reinsured liabilities?"

4 MS. BONACCI: Objection to form.

5 A. Me? No, I don't know exactly
6 what that means, but I would say in the
7 purchase of Reliance there must have been
8 something in the agreement between
9 Travelers and Reliance.

10 Q. So as you sit here today, do you
11 have any knowledge of whether Travelers
12 had any reinsurance obligations with
13 respect to the four bonds that we marked
14 as DASNY Exhibits 2 through 5?

15 A. No, I don't know.

16 MS. SMITH: I'm sorry, no, I
17 don't know or --

18 THE WITNESS: No, I don't know.

19 MS. SMITH: Thank you.

20 Q. Mr. Scarpellino, at any time in
21 your capacity as a bond claims manager
22 with Travelers, have you become aware of
23 allegations of defects in terrazzo
24 flooring at Baruch College?

25 A. Yeah, I became aware of that.

1 J. Scarpellino

2 Q. Do you recall when Travelers
3 first learned of those allegations?

4 A. I believe the first time I've
5 heard about the terrazzo, that there was a
6 problem with the terrazzo, was after my
7 second meeting with Doug Van Vleck, which
8 would have been I believe somewhere around
9 the late fall, early winter of 2003.

10 Q. And you said that that was your
11 second meeting with Mr. Van Vleck?

12 A. Yes.

13 Q. When was your first meeting with
14 Mr. Van Vleck?

15 A. I believe sometime in the spring
16 of 2003.

17 Q. Focusing your attention on the
18 first meeting, who else besides you and
19 Mr. Van Vleck was present at that meeting?

20 A. There was Nick Seminara from
21 Travelers.

22 Q. Anyone else?

23 A. Brian Fern, F E R N, from
24 Travelers. I believe Steve Boiko.

25 That's all I recall at this

J. Scarpellino

point.

Q. Who is Nick Seminara?

A. Nick Seminara was the -- at the time I believe he was the vice president of contract surety claims in Hartford.

Q. Is Mr. Nick Seminara still employed by Travelers?

A. Yes.

Q. Do you know his current title?

A. No.

Q. Is he still working in the surety bond area?

A. No.

Q. Do you know what area he is working in?

A. I'm not sure of the exact location, whether it's claim or legal.

Q. At that time in the spring of 2003 did you report to Mr. Seminara?

A. Yes.

Q. Who is Brian Fern?

A. Brian Fern is our in-house engineer.

Q. And does Mr. Fern still work for

J. Scarpellino

Travelers?

A. Yes.

Q. And is he still an in-house engineer?

A. Yes.

Q. What was the purpose of the meeting you had with Mr. Van Vleck in the spring of 2003?

A. We had a meeting in order to determine if we were agreeable to collect some contract balances and to -- for contract fifteen and sixteen, for Trataros, and also to see if we could attempt to make a deal to -- on the delay portion of the claims. I believe we made a recommendation that we would give DASNY a hold harmless, they'd pay us the money for the delay claims, and we in turn will turn around and take care of the subs. This way we could close out the project.

Q. Was there any mention of terrazzo flooring at that meeting?

A. No, the only mention at that meeting was we had another project with

1 J. Scarpellino

2 DASNY which was the Queens College
3 Powdermaker Hall project and he said they
4 were behind on that project. He said if
5 we escalate, he'll talk again about
6 getting this thing resolved, the delay
7 claim and our contract balances.

8 Q. Was Trataros working at
9 Powdermaker Hall?

10 A. He was the contractor on that
11 project.

12 Q. And Travelers became involved in
13 that project?

14 A. Travelers was involved in that
15 project.

16 Q. And was Travelers involved in
17 connection with bonds that had been issued
18 on behalf of Trataros?

19 A. For Powdermaker Hall?

20 Q. Yes.

21 A. I'm not sure if it was a
22 Reliance bond or a Travelers bond, but
23 Travelers was the responsible bonding
24 party for that contract.

25 Q. Just so I'm clear, I know you

1 J. Scarpellino

2 said Travelers was the responsible bonding
3 party, but was the obligor on those bonds
4 Trataros? Again, I'm talking about
5 Powdermaker.

6 A. Yes.

7 Q. The second meeting that you had
8 with Mr. Van Vleck, who was in attendance
9 at that meeting?

10 A. I believe it was just Mr.
11 Seminara and myself and Mr. Van Vleck and
12 Mr. Boiko.

13 Q. And to your recollection, Mr.
14 Fern was not at that meeting?

15 A. No.

16 Q. What was the purpose of that
17 meeting?

18 A. Well, I believe we had fairly
19 well got Queens College either behind us
20 or on the right track and we were trying
21 to get additional funds for the Baruch
22 project and that's when he told us that,
23 you know, the offer we had made, as far as
24 a hold harmless agreement for the delay
25 claims, contract balances, and so on, to

1 J. Scarpellino

2 the best of my recollection he made us a
3 lowball offer at that point of \$8 million
4 and then he informed us that there was a
5 problem with the terrazzo.

6 Q. And you said that meeting
7 occurred sometime in the fall or early
8 winter of 2003?

9 A. To the best of my recollection.

10 Q. Was that the first time that
11 anyone had advised you that there was a
12 potential issue with respect to the
13 terrazzo flooring at Baruch College?

14 MS. BONACCI: Objection to form.

15 MR. FROESSEL: I'm sorry, what's
16 the objection?

17 MS. BONACCI: Anyone. You mean
18 anyone from DASNY or anyone in total?

19 Q. Was that meeting in the late
20 fall or early winter of 2003 with Mr. Van
21 Vleck the first time that you learned of
22 allegations of defects in the terrazzo
23 flooring at Baruch College?

24 A. It was the first time we heard
25 of a major defect. Prior to that, in

1 J. Scarpellino

2 handling the Crocetti claim, we knew that
3 they were doing some punch list and some
4 corrective work on their flooring.

5 Q. At that second meeting with Mr.
6 Van Vleck, did either you or Mr. Seminara
7 respond in any way to the allegations of
8 defects in the terrazzo flooring?

9 A. I believe we just requested
10 information as to what was going on out
11 there.

12 Q. Do you recall whether either you
13 or Mr. Seminara made any statements to
14 DASNY about any cleaning materials that
15 were used on the floor at Baruch College?

16 A. I specifically don't recall
17 that.

18 Q. At the time of your first
19 meeting with Mr. Van Vleck in the spring
20 of 2003 was Trataros still in business?

21 A. I believe Trataros closed its
22 doors sometime in the spring of '03.

23 Q. How did Travelers become aware
24 that Trataros was ceasing its business?

25 A. I was on the Trataros case since

1 J. Scarpellino

2 Q. What at that time was Travelers
3 doing to investigate any potential problem
4 with the terrazzo that was installed at
5 Baruch College?

6 A. We were trying to determine why
7 the terrazzo at certain points was
8 cracking, whether or not it was the
9 concrete substrate, whether or not it was
10 the underlayment that was underneath the
11 terrazzo, whether or not it was just a bad
12 terrazzo job. We were just trying to get
13 some information as to what the problem
14 was.

15 Q. What did you do to try to get
16 that information?

17 A. I believe we were just trying to
18 get some information, whatever we could,
19 from Trataros at that time or go through
20 Trataros' records at that time I should
21 say because I don't know if Trataros was
22 around at this time.

23 Q. Did there come a time when
24 Travelers did anything more than just
25 reviewing Trataros' records and talking to

1 J. Scarpellino

2 MS. BONACCI: Is that true?

3 Because your counterclaim asserted \$20
4 million and there have been
5 representations to the parties at this
6 table that it includes work that does
7 not include terrazzo.

8 MR. FROESSEL: I will limit my
9 questioning on these affirmative
10 defenses to anything relating to
11 terrazzo.

12 Q. With respect to DASNY's
13 counterclaim concerning terrazzo defects,
14 do you know the factual basis of
15 Travelers' defense that DASNY lacks
16 standing to prosecute the counterclaim
17 against Travelers?

18 MS. BONACCI: Objection.

19 To the extent you know. You can
20 answer to the extent you know.

21 A. As far as the performance bond,
22 DASNY never terminated Trataros, never put
23 the surety on notice that there was a
24 problem with the project, the project was
25 complete, the project had been in use for

1 J. Scarpellino

2 two, three years after completion, DASNY
3 again never put Travelers on notice of any
4 problem, anything wrong with this project
5 or with Trataros' performance on this job.
6 We never had any documentation or any
7 letters at all from DASNY regarding that.

8 Q. Turning the page to page eight,
9 I'm looking specifically at the thirteenth
10 affirmative defense.

11 A. What number, I'm sorry?

12 Q. The thirteenth affirmative
13 defense.

14 With respect to the terrazzo
15 flooring only, do you know the factual
16 basis of the defense that the counterclaim
17 is barred, in whole or in part, by DASNY's
18 failure to provide Trataros with
19 non-defective plans, drawings, and/or
20 technical specifications for the project?

21 MS. BONACCI: Objection.

22 To the extent you know.

23 A. Again, it's part of the lawsuit
24 and I'll leave that up to counsel.

25 Q. Going down the page to the

1 J. Scarpellino

2 At this point I'll turn it over
3 to any of the counsel that may have
4 questions.

5 EXAMINATION BY

6 MS. RAICUS:

7 Q. I represent one of the myriad of
8 insurance companies as the fourth-party
9 defendants.

10 To which performance bond are
11 you referring when you testified
12 previously that DASNY was obligated to
13 notify Travelers and did not do so?

14 A. We're talking about the
15 terrazzo, so the terrazzo was contract
16 sixteen.

17 Q. Contract sixteen?

18 Who were the parties to that
19 contract?

20 A. Trataros was the principal.
21 DASNY was the obligee.

22 Q. Do you specifically recall --
23 and again, you can refer to any of the
24 documents if you want -- do you
25 specifically recall the time period within

1 J. Scarpellino

2 which notice was required to Travelers
3 from DASNY?

4 A. DASNY never notified Travelers,
5 never defaulted Trataros on the project,
6 and that's part of the way the bond is
7 written, there's a notice provision in
8 there.

9 Q. I'd like to refer to the exhibit
10 that contains the letter from TDX that
11 refers to the terrazzo flooring. I
12 believe that's Exhibit 13. I'm referring
13 to the August 28, 2003 letter from TDX to
14 Trataros.

15 Do you know what the source of
16 TDX's information that's contained in this
17 letter is?

18 A. I had no idea -- like I said
19 prior, Crocetti had made a payment bond
20 claim. We were investigating the payment
21 bond claim. We were informed that there
22 was some punch list, some patching that he
23 was doing on the terrazzo floor in
24 different areas. We were informed by
25 Crocetti's attorney that basically the

1 J. Scarpellino

2 work was done in accordance with the plans
3 and specs and he wanted payment. I
4 indicated, until we get the okay that that
5 work was completed, you know, that we
6 would not make any payment. But we had no
7 idea what was behind this letter.

8 Q. Now, at some point during the
9 course of this Baruch project, would
10 different aspects of the project be signed
11 off on as complete, such as plumbing, such
12 as electric, such as ceiling?

13 A. That's what's normally done on a
14 project; correct?

15 Q. Was it done on this project?

16 A. Travelers did not follow this
17 project. This was a project that Trataros
18 was completing. We left them alone. They
19 went on their own to do their thing. I
20 was involved in handling the other sixteen
21 projects. This was a project that at the
22 end of the day they were going to be
23 making money on if they ever got paid. So
24 we didn't follow it. We never had any
25 notice from DASNY, any notice from TDX,

1 J. Scarpellino

2 any notice from anyone that there was a
3 problem or that they were going to
4 terminate Trataros, default Trataros,
5 whatever.

6 Q. Now, is this letter from TDX
7 dated August 28, 2003 the first notice
8 that somehow came into the possession of
9 Travelers regarding alleged problems with
10 the terrazzo floor?

11 A. Again, it was our first notice
12 that there was a problem with the floor,
13 but we had no idea of the extent of the
14 problem or what the situation was. That's
15 why I wrote the letter to Mr. Wirth
16 indicating what's going on, I received
17 this letter, you know, you're telling me
18 one thing, these guys are telling me that
19 the, you know, the floors have to be
20 replaced.

21 Q. Now, whatever completion of this
22 project and before litigation, did you
23 ever come to learn that certain aspects of
24 the project were signed off on?

25 A. The project was complete. From

1 J. Scarpellino

2 the first floor to the fourteenth floor
3 were signed off on in September of '01 and
4 the bottom three sections, the basement
5 and the two subbasements, the lower three
6 levels were signed off on I believe the
7 end of January or February, '02.

8 Q. And when you say, "signed off
9 on," are you referring to a physical
10 document?

11 A. The project was complete, the
12 certificate of occupancy for the entire
13 building, the building was in use for
14 classes beginning on September 1 except
15 for the lower three floors. After
16 January, February, '02, they had use and
17 occupancy of the entire building.

18 Q. Do you know where such documents
19 would be located, the certificate of
20 occupancy, et cetera?

21 A. I'm sure they're in DASNY's
22 records.

23 Q. Now, again looking at this
24 letter dated August 28, 2003, in reviewing
25 this document, can you tell me where the

1 J. Scarpellino

2 alleged terrazzo floor problems were
3 located, meaning were they located on the
4 lower three levels or floors one through
5 fourteen or both or something else?

6 MS. BONACCI: Objection.

7 Go ahead.

8 A. The letter says what the letter
9 says. I mean, I got the letter and it
10 just indicates that there's flooring
11 deficiencies, unsafe conditions, and so
12 on. And then, when we had our second
13 meeting with Van Vleck, that's when he
14 indicated that -- and he made us that
15 lowball offer and indicated that there was
16 a problem with the floor that we started
17 to get more information on it.
18 Apparently, you know -- that's it, that's
19 when we started getting more information
20 on it, after that meeting.

21 Q. Is Mr. Van Vleck associated with
22 DASNY?

23 A. He was the head of construction
24 of DASNY. I'm not sure of his exact
25 title, but he was the top man, I believe.

1 J. Scarpellino

2 Q. Did Mr. Van Vleck ever tell you
3 whether or not there were any Department
4 of Building inspections of the flooring?

5 A. No, he just indicated -- to the
6 best of my recollection, the only thing he
7 indicated was that there was a problem
8 with the terrazzo flooring and he wasn't
9 -- that basically they weren't going to
10 pay the contract balances and delay claims
11 and so on and they gave us that lowball
12 offer.

13 Q. Did you keep minutes of either
14 of the meetings that you had with Mr. Van
15 Vleck?

16 A. Not to my knowledge.

17 Q. To your knowledge, did Mr. Van
18 Vleck ever report the alleged terrazzo
19 floor problems to the New York City
20 Department of Buildings?

21 A. I have no idea.

22 Q. To your knowledge, were any
23 violations issued by the New York City
24 Department of Buildings with respect to
25 the terrazzo flooring?

CERTIFICATION BY REPORTER

I, Wayne Hock, a Notary Public of the State of New York, do hereby certify:

That the testimony in the within proceeding was held before me at the aforesaid time and place;

That said witness was duly sworn before the commencement of the testimony, and that the testimony was taken stenographically by me, then transcribed under my supervision, and that the within transcript is a true record of the testimony of said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, that I am not interested directly or indirectly in the matter in controversy, nor am I in the employ of any of the counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of June, 2008.

Wayne Hock